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FEDERAL COMMUNICATIONS COMMISSION
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Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Twelfth Street, Lobby, TW-A325
Washington, D.C. 20554

VIA HAND DELIVERY

Re: *Ex Parte* in IB Docket No. 98-172

Dear Ms. Salas:

On behalf of our client, Winstar Communications, Inc. ("Winstar"), this is in response to *ex parte* letters filed by the Teledesic Corporation ("Teledesic") with various Legal Assistants of the Chairman and Commissioners on April 25-27, 2000. We are also responding to a second set of *ex parte* letters that Teledesic filed with the Chairman and Commissioners on May 1, 2000.

Since the onset of this proceeding, some elements of the satellite industry have consistently sought to significantly weaken the successful Commission policies governing forced spectrum relocations. As noted below, Winstar strongly encourages the Commission to reject these arguments and to adopt relocation rules that are consistent with its well-established and effective relocation principles.

Overview: Why 18 GHz is Important to Competitive Broadband Providers

Winstar uses the LMDS and 38.6-40.0 GHz bands to provide broadband services directly to consumers.[1] The company is dedicated to providing broadband solutions to the

[1] As the top bidder in the 38 GHz auction that closed May 8, 2000, Winstar submitted winning bids of approximately $161 million for 931 licenses. This new spectrum supplemented existing Winstar 38 GHz holding. Winstar was also one of the largest bidders in the LMDS auction.

local bottleneck and shares the interest of the Commission in promoting competition throughout the country.

New Winstar hub sites are often spaced far enough apart to allow the re-use of LMDS and 38 GHz channels. However, the ability to interconnect these hub sites is key to building a national broadband competitive network. Where fiber is unavailable,[2] a primary means of connecting hub sites is through lower microwave bands which provide a greater operating range (up to 5 miles in the case of 18 GHz). The fixed service industry has relied on the FCC rules and pronouncements that 2 GHz, then 6 GHz, and then 18 GHz would be available to the fixed service for such links. The 23 GHz band is often unsuitable. Ironically, at the same time Winstar needs to dramatically increase deployment of 18 GHz links, this rulemaking is seeking to restrict the availability of the 18 GHz band, without providing a replacement band for connectivity between hub sites. There is tremendous interest and investment in the LMDS and 38 GHz bands. Fixed service providers are serious about growth, are building record numbers of hub sites, and the related need for hub connectivity at 18 GHz or a comparable replacement band is understandably exploding.

Response to the April 25-27, 2000 Ex Parte Filings

Teledesic cites numerous reasons why the Commission should change the relocation rules to benefit the Fixed Satellite Service ("FSS") licensees who are displacing the Fixed Service ("FS") licensees in the 18 GHz (17.7-19.7 GHz) band. None of these reasons justify modification of the relocation rules established by the Commission in the *Emerging Technologies* and *Cost Sharing* proceedings.

The difference between mobile and fixed services must not be ignored. It is suggested that any modifications to the 2 GHz relocation rules to accommodate the Mobile Satellite Service ("MSS)" must somehow justify changes at 18 GHz. It is irrelevant, however, whether the Commission decides in a separate proceeding to modify the relocation rules applicable to 2 GHz Mobile Satellite Service ("MSS"). In considering the 2 GHz and 18 GHz bands, there is an important distinction between mobile and fixed satellite services that is not acknowledged -- 2 GHz mobile satellite service providers must deploy on a nationwide basis given the ubiquitous **mobile** nature of the service. Without the prior relocation of all FS licensees at 2 GHz, there would be an immediate nationwide conflict between mobile satellite and FS users. However, at 18 GHz, there will be two **fixed** services – FSS and FS. FSS providers can deploy and market their services where selective relocation of FS incumbents has occurred, by cherry-picking those areas that provide the greatest business opportunities. So, while the Commission may want to consider minor modifications to the relocation rules applicable to the mobile satellite services, the same rationale does not apply to fixed services at 18 GHz.

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[2] Fiber is only available in approximately 10,000 of the 750,000 commercial buildings in the United States.

This is not about the segmentation of a clean band, it is about forced relocation. Much is made of the fact that the 18 GHz band is co-primary between the fixed service and the fixed satellite service, and that the satellite services are not really ejecting the FS from the 18 GHz band, because the band is merely being "segmented." We find this position inexplicable. Regardless of how it is characterized, FSS providers are advocating for the displacement of all incumbent FS licensees from the 18.8-19.3 GHz portion of the band. These FS licensees **are being forcibly relocated**, and the only reason they are being relocated is to benefit the FSS licensees. Referring to the forced relocation of operating systems as a "segmentation" is a red herring. What matters is that FS incumbents who obtained their licenses, constructed their systems and operated for years in the 18.8-19.3 GHz portion of the band will no longer be permitted to continue operations in this band. Whether or not this spectrum was "co-primary" is immaterial. This is a forced relocation in every sense of the word.

Recycled arguments notwithstanding, the Commission got it right. It is argued that 18 GHz incumbents should never have expected that the existing relocation rules would apply to the 18 GHz band. However, the more important issue is ignored: that licensed incumbents in the 18 GHz band reasonably expected to continue operating in the band without any relocation at all. If the Commission now determines that it is in the public interest to relocate FS incumbents, as a direct result of advocacy by the fixed satellite service industry, then it is completely reasonable to expect that the existing precedent for relocating the fixed service be respected. Again, the Commission got it right when it established that precedent. The relocation worked. The critics who predicted dire consequences and failure back then were wrong. The dire predictions now being made about the Commission's relocation rules are old and tired.

Blaming the FS for a 1984 Commission decision is misplaced. It is claimed that FS licensees created the situation where relocation is necessary, because they allegedly resisted attempts to segment the 18 GHz band in 1984. The **Commission** rejected attempts by the FSS to segment the band at that time. *Establishment of Spectrum Utilization Policy and Amendment to Commission rules Regarding Digital Termination Systems*, 49 Fed. Reg. 37760, ¶ 41 (Sept. 26, 1984). Now, because the FSS was unable to obtain segmentation in 1984, it is argued that somehow or another this turn of events in 1984 justifies the relocation of FS licenses without a policy of comparable facility relocation. Such a position seems to turn the FCC rule making process on its head. It also has no relevance to the current proceeding. Winstar did not exist in 1984. It relied in good faith on Commission licensing rules for building and operating its 18 GHz systems.

Response to the May 1, 2000 Ex Parte Filing

Teledesic claims that 18 GHz incumbents are seeking over-compensation and would reap a "windfall" if existing relocation rules apply. This is not true. All the FS asks is that if it is forced to relocate, then it be made whole.

There are no proposed or existing rules that require payment of a "premium" or a "windfall." The voluntary and mandatory negotiation periods were established to allow new entrants the ability to negotiate in markets where they seek early entry, rather than forcing the new entrants to relocate all incumbents at the same time under involuntary relocation. During this time, the new entrant is under no obligation whatsoever to pay "premiums" to incumbents, contrary to what is suggested. The negotiations are voluntary.

The Commission's definition of "comparable facilities" does not "include an inherent windfall" if the incumbent receives new replacement equipment. Most incumbents are more than willing to stay where they are, operating with existing equipment that satisfies their communications requirements. When forced to relocate, there is often only new equipment available for operation in the relocation band. To call that a "windfall," when the new entrant forced the relocation in the first place, is absurd. It is also inaccurate. The replacement equipment need not be new and/or improved: it need only be "comparable" to the old equipment (which the incumbent would have been pleased to continue operating on the former frequencies).

Finally, there is no "tax windfall" to incumbents. If an incumbent receives replacement equipment in exchange for its existing system, then the incumbent's basis in its existing equipment is transferred to the replacement equipment. Therefore, the current rules avoid a "tax windfall" to incumbents. If the Commission were to follow the suggestion to rebate to the new entrant the amount of depreciation, FSS providers would get a windfall by receiving the benefit of the incumbents' equipment depreciation, thereby effectively requiring the incumbents to pay for the replacement systems.

Conclusion

The Commission should apply long-established policies that carefully balance the rights and duties of incumbents and new entrants. **Commission precedent and the principle of fair treatment for incumbents requires nothing less than (1) full replacement cost as the basis for compensation, using the well-established "comparable facilities" standard, and (2) adequate voluntary and involuntary negotiation periods prior to mandatory relocation.** In addition, the sunset period for relocation should not begin to run until unencumbered relocation spectrum is identified by the Commission, and an equitable cost reimbursement scheme is developed, as has been the case in previous relocations.

Pursuant to Section 1.1206 of the Commission's rules, two copies of this letter have been filed with your office. Copies are also being provided to each of the Commission officials listed below. Please feel free to contact me with any questions.

Sincerely,

Jack Richards

cc: Chairman William E. Kennard
Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael K. Powell
Commissioner Gloria Tristani
Ari Fitzgerald
Adam Krinsky
Mark Schneider
Peter Tenhula
Bryan Tramont
Donald S. Abelson
Richard B. Engleman
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